

ARKANSAS SUPREME COURT

No. CR 07-407

JAMES KELLEY HAYNES
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered February 7, 2008

APPEAL FROM THE CIRCUIT COURT
OF SEBASTIAN COUNTY, FORT
SMITH DISTRICT, CR 2001-936, HON.
JAMES MARSCHEWSKI, JUDGE

AFFIRMED.

PER CURIAM

In 2002, appellant James Kelley Haynes, who is also known as James Kelly Haynes, was found guilty by a jury of rape and burglary and sentenced as a habitual offender to life and 480 months' imprisonment. We affirmed. *Haynes v. State*, 354 Ark. 514, 127 S.W.3d 456 (2003), cert. denied 541 U.S. 1047 (2004). Subsequently, appellant timely filed in the trial court a verified pro se petition for relief pursuant to Ark. R. Crim. P. 37.1, and the trial court appointed counsel. After conducting an evidentiary hearing, the trial court denied the petition, and appellant, still represented by counsel, has lodged an appeal here from that order.

As his sole point on appeal, appellant argues that the trial court erred in its denial of the Rule 37.1 petition in that trial counsel was ineffective. He first claims that counsel failed to properly prepare and defend him at trial. He also complains that counsel failed to prevent appellant from being unfairly tried by a racially-discriminatory jury. The trial court rejected both of these arguments.¹

¹Appellant raised several additional issues in the original petition filed in the trial court but did not raise them on appeal. Claims raised below but not argued on appeal are considered abandoned. *State v. Grisby*, 370 Ark. 66, ___ S.W.3d ___ (2007) (citing *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004)).

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent counsel's errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

Here, appellant argues that trial counsel did not properly prepare for trial or defend him in two aspects: he failed to meet with appellant prior to trial to prepare a defense and he failed to discuss the testimony of appellant's wife with him. Regarding the former accusation, at the Rule 37.1 hearing, appellant complained that counsel met with him only five or six times prior to trial and that was insufficient to mount a proper defense. In contrast, trial counsel testified at the hearing that trial preparation for appellant's case included personally meeting with appellant approximately ten times, seeking discovery from the State including exculpatory evidence, filing a motion to suppress evidence, seeking DNA testing of evidence, accompanying appellant when a blood sample was drawn,

interviewing witnesses and undertaking other actions necessary to properly defend appellant at trial.

As to the latter allegation, appellant claims that counsel failed to consult with him about Mrs. Haynes' trial testimony and failed to discover her prior inconsistent statements made to the police. At the Rule 37.1 hearing, trial counsel explained that Mrs. Haynes gave at least two statements to the police in which she denied that appellant was with her at the time the crimes were committed, but told trial counsel that she had been mistaken as to the dates in those statements. According to counsel, he and appellant discussed the need to establish an alibi for appellant and the potential use of the prior inconsistent statements for impeachment by the State. Together, they agreed that it was in appellant's best interest to call Mrs. Haynes as a witness to establish his alibi and that her prior inconsistent statements could be plausibly explained.

Conflicts in testimony are for the trial judge to resolve. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). The trial judge is not required to believe the testimony of any witness, particularly that of the petitioner since he or she is the person most interested in the outcome of the proceedings. *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001). Where there is conflicting evidence, the issue becomes one of credibility to be determined by the trial court. *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999).

Here, regarding trial preparation, the trial court found counsel's testimony to be more credible than appellant's testimony, and we defer to the trial court's determination of credibility on Rule 37.1 appeals. *State v. Barrett*, ___ Ark. ___, ___ S.W.3d ___ (Sept. 27, 2007) (citing *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001)). As a result, appellant failed to meet his burden of proving that trial counsel was unprepared for trial. The trial court also found that counsel discussed Mrs. Haynes'

testimony with appellant, that counsel was prepared to address her prior inconsistent statements at trial and that appellant and counsel made a tactical decision in calling her as witness in order to benefit appellant's defense. Tactical decisions cannot be the basis for a claim of ineffective assistance of counsel. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). We cannot say the trial court's findings were clearly erroneous on these points, and appellant failed to show that trial counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by counsel's actions.

Appellant also contends that counsel failed to obtain additional peremptory challenges during jury selection, causing appellant to be convicted by a racially-discriminatory jury. However, in the Rule 37.1 petition and on appeal, appellant has failed to cite any legal or factual basis to support his claim that the jury selection was premised upon exclusion of jurors based on race pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), or that counsel failed to take an available action to prevent a biased jury from being seated. In a claim of ineffective assistance of counsel, the burden is on appellant to provide facts to support his claims of prejudice and allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Further, conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

Here, appellant's argument on this point amounted to mere conclusory statements. He has provided no facts to support the allegation that the jury was biased against him because of his race, or that trial counsel failed to undertake a viable legal maneuver to prevent appellant from being tried by the jury that was empaneled.

Affirmed.